Supreme Court, U.S.
FILED
MAR 9 2003
OFFICE OF THE CLERK

(12)

No. 02-749

IN THE

Supreme Court of the United States

RAYTHEON COMPANY,

Petitioner,

v.

JOEL HERNANDEZ,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 12, 2002
CERTIORARI GRANTED FEBRUARY 24, 2003

99 pp

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The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear in the appendix of the Petition for a Writ of Certiorari on the following pages:

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Order And Judgment Of The United States District Court For Tl e District Of Arizona Filed January 31, 2001 ..... 16a

APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (TUCSON)

U.S. District Court

U.S. District Court for the District of Arizona (Tucson)

CIVIL DOCKET FOR CASE #: 98-CV-319

Hernandez v. Hughes Missle System, et al.
Filed: 07/06/98
Assigned to: Judge John M. Roll
Jury demand: Plaintiff
Demand: $0,000
Nature of Suit: 440
Lead Docket: None
Jurisdiction: Federal Question
Dkt # in other court: None
Cause: 28:1331 Fed. Question: Employment Discrimination

JOEL HERNANDEZ
plaintiff

Richard Moreno Martinez, Esq
FAX (520) 320-9090
[COR LD NTC ret]
Law Offices of Richard M. Martinez
3131 E 2nd St
Tucson, AZ 85716
(520) 327-4797

v.

Appendix A

HUGHES-MISSLE SYSTEMS COMPANY,
an AZ Corporation
defendant

Ronald J Stolkin, Esq
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Barney Myer Holtzman
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Fennemore Craig PC
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Ste 1000
Tucson, AZ 85701-1627
(520) 879-6800

HUGHES AIRCRAFT COMPANY,
a Delaware Corporation
defendant

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Appendix A

RAYTHEON COMPANY,
a Delaware Corp

defendant

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7/6/98 1 COMPLAINT FILED (pb) [Entry date 07/08/98]

7/6/98 2 DEMAND for jury trial by pla (pb) [Entry date 07/08/98]

* * *

8/14/98 6 ANSWER by dft Hughes Missle System, dft Hughes Aircraft, dft Raytheon Co (bsw) [Entry date 08/17/98]

8/21/98 7 AMENDED ANSWER to [6-1] by dfts (bsw) [Entry date 08/24/98]

* * *

Appendix A

9/11/00 70 MOTION for summary judgment by dfts [70-1] (bsw) [Entry date 09/12/00]

9/11/00 71 STATEMENT OF FACTS by dft Hughes Missle System, dft Hughes Aircraft Co, dft Raytheon Company re motion for summary judgment by dfts [70-1] (bsw) [Entry date 09/12/00]

* * *

10/26/00 76 RESPONSE by pla Joel Hernandez to motion for summary judgment by dfts [70-1] (bsw) [Entry date 10/30/00]

10/26/00 77 STATEMENT OF FACTS by pla Joel Hernandez re motion in sum jgm response (bsw) [Entry date 10/30/00]

11/13/00 78 REPLY by dfts to response to motion for summary judgment by dfts [70-1] (bsw) [Entry date 11/14/00]

11/13/00 79 STATEMENT OF FACTS by dfts re reply to response to mtn for sum jgm (bsw) [Entry date 11/14/00]

* * *

Appendix A

11/22/00 82 SUPPLEMENTAL by dfts to its reply in support of their mtn for sum jgm [78-1] (bsw) [Entry date 11/27/00]

* * *

1/31/01 85 ORDER by Judge John M. Roll granting motion for summary judgment by dfts [70-1] (cc: all counsel) (kt) [Entry date 01/31/01]

1/31/01 86 JUDGMENT: by Judge John M. Roll re: order [85-1] terminating case; it is ordered that dft's mtn for summary judgment is granted; it is further ordered that judgment is entered in favor of dft's & against the plaintiff (cc: all counsel) (kt) [Entry date 01/31/01]

* * * *

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 01-15512
Filed: 3/21/01
Nsuit: 3440
Contract: Other civil rights (Fed)
Hernandez, et al v. Hughes Missile Sys, et al
Appeal from: District of Arizona (Tucson)

Case type information:
1) civil
2) private
3) (null)

Lower court information:
District: 0970-4 : CV-98-00319-JMR
court reporter: Chris Calles, Court Reporter
presiding judge: John M. Roll, District Judge
Date Filed: 7/6/98
Date order/judgment: 1/31/01
Date NOA filed: 2/22/01

Fee status: paid

Prior cases: None

Current cases: None

Appendix B

JOEL HERNANDEZ
Plaintiff-Appellant

Richard M. Martinez, Esq.
FAX 520/320-9090
520/327-4797
[COR LD NTC ret]
3131 E. Second Street
Tucson, AZ 85716

v.

HUGHES MISSILE SYSTEMS COMPANY,
an Arizona corporation
Defendant-Appellee

Barney Myer Holtzman
520-879-6800
[COR LD NTC ret]
FENNEMORE CRAIG
One South Church
Tucson, AZ 85701-1627

Ronald J. Stolkin, Esq.
FAX 520/879-6801
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LAW OFFICES OF FENNEMORE CRAIG
One South Church Avenue
Tucson, AZ 85701-1627

Appendix B

HUGHES AIRCRAFT COMPANY,
a Delaware Corporation
Defendant-Appellee

Barney Myer Holtzman
(See above)
[COR LD NTC ret]

Ronald J. Stolkin, Esq.
(See above)
[COR LD NTC ret]

RAYTHEON COMPANY,
a Delaware Corporation
Defendant-Appellee

Barney Myer Holtzman
(See above)
[COR LD NTC ret]

Ronald J. Stolkin, Esq.
(See above)
[COR LD NTC ret]

Appendix B

JOEL HERNANDEZ
Plaintiff-Appellant

v.

HUGHES MISSLE SYSTEMS COMPANY, an Arizona a corporation; HUGHES AIRCRAFT COMPANY, a Delaware corporation; RAYTHEON COMPANY, a Delaware corporation

Defendants-Appellees

* * *

7/19/01	Filed original and 15 copies Appellant Joel Hernandez opening brief (Informal: no) 19 pages and five excerpts of record in lvolumes; served on 7/16/01 [01-15512] (dg)

* * *

8/31/01	Filed original and 15 copies appellee Raytheon Company, Hughes Aircraft Co., Hughes Missile Sys.'s 25 pages brief, 5 suppl Exc. in 1 vol: ; served on 8/29/01 [01-15512] (gar)

* * *

10/4/01	Filed original and 15 copies Joel Hernandez reply brief, (Informal: no) 11 pages; served on 10/1/01 [01-15512] (dg)

Appendix B

10/17/01 Filed motion and deputy clerk order: (Deputy Clerk: cag) Aples' motion to strike Section I.B. of aplt's reply brief and any related filing shall be referred for disposition to the panel that considers the merits of the case. [4276552-1] (Motion recvd 10/12/01) [01-15512] (dg)

* * *

2/16/02 ARGUED AND SUBMITTED TO Stephen R. REINHARDT, Frank J. Magill, Raymond C. FISHER [01-15512] (gb)

6/14/02 FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed and Remanded; Written, Signed, Published. Stephen R. REINHARDT, author; Frank J. Magill; Raymond C. FISHER.) FILED AND ENTERED JUDGMENT. [01-15512] (dg)

* * *

7/2/02 [4471659] Filed original and 50 copies Appellee Hughes Missile Sys., Hughes Air craft Co., Raytheon Company petition for panel rehearing and petition for rehearing en banc 18 p.pages, served on 7/2/02 (PANEL & ALL ACTIVE JUDGES) [01-15512] (ru)

* * *

Appendix B

8/12/02 Filed order and amended opinion (Judges Stephen R. REINHARDT, author, Raymond C. FISHER) (Orig. opinion id: [4453472-1]) The opinion filed 6/11/02, is amended as follows: (see opinion for text). With these amendments, the panel has voted to deny the P/R & P/R en banc. [4471659-1] [01-15512] (dg)

* * * *

APPENDIX C — EMPLOYEE SEPARATION SUMMARY

COMPL. PRIVATE (WHEN COMPLETED)

EMPLOYEE SEPARATION SUMMARY

(TYPEWRITTEN MUST BE USED) YNN

VERIFIED

HUGH

PAY CD CODE	PAYROLL NUMBER	LAST NAME	FIRST	MI	SOCIAL SECURITY NUMBER	ORGN CODE
HAC	87449	HERNANDEZ	JOEL		573-48-8845	SL-35-24

EMPLOY PART TIME ☐ EMPLOY PROBATIONARY ☐ EMPLOY SEASONAL ☐

DATE PREPARED

DATE OF NOTIFICATION	LAST DAY WORKED	EFFECTIVE DATE OF SEPARATION LEAVE BOARD	PAY AREA
07/16/91	07/12/91	7-12-91	25

REASON FOR SEPARATION (MARK ONE)

- ☐ QUIT (GIVE SPECIFIC REASON)
- ☐ LAYOFF - LACK OF WORK
- ☐ LAYOFF - PHYSICAL DISQUALIFICATION
- ☐ RETIREMENT
- ☒ DISCHARGE (GIVE SPECIFIC REASON)
- ☐ DECEASED (INDICATE DATE OF DEATH) _____
- ☐ MILITARY SERVICE
- ☐ ACTIVE SERVICE

SPECIFIC REASON FOR SEPARATION:

1) DISCHARGE FOR POTENTIAL CONFLICT

(Quit in lieu of discharge HH 7/30/91)

NAME OF NEXT EMPLOYER

EVALUATION RATINGS

	EXCELLENT	GOOD	FAIR	POOR
ABILITY	☐	☒	☐	☐
CONDUCT	☐	☐	☒	☐
PRODUCTION	☐	☐	☒	☐

SUPERVISOR NAME AND INITIALS J. M. RIPPA

LOC Bld LOG N26 MAIL STATION _____ PHONE 45585

AUTHORIZING SIGNATURES

SUPERVISOR	DATE	DEPARTMENT/DIVISION	DATE
J M Ripp	7-24-91		7/24/91
DIRECTOR	DATE	MAJOR ORGANIZATION	DATE

FINAL STATUS SUMMARY

ITC DATE	JOB CODE	JOB CLASSIFICATION	REMC	ADJ TYPE	TAM	LOC	OT	BARG UNIT	TRANS	WORK WEEK	PART TIME	OUT OF TRADE AREA
7/13/91	40176	CAL SVC TECH-WL	00	34	H	313	D	1	1	40.0	N	

BASE RATE	COST OF LIVING	WAGE/SUM	TABLE AMOUNT	GRANTED AMOUNT	OTHER COMPENSATION	PAY RATE	SUB	SA	SUB	EDUCATIONAL EXTENS
16.93						16.93	00	000	00	

RACE CODE	HIRE DATE	START DATE	SERVICE DATE	BUS CODE	SEX	MED. ABSTR.	VET STAT	BIRTH DATE	AGE	SAL INS	INC INS	RATINGS	ACHIEVEMENT	AWARDS	ADJUSTMENT
HCN	07/27/66	05/26/69	11/12/67	B	M	N	N	04/23/40	51			A	A	A	N

THIS SECTION FOR HUMAN RESOURCES USE ONLY

SICK LEAVE ACCRUED	SICK LEAVE PROBATED	NORMAL VACATION (NVA) ACCRUED	NORMAL VACATION (NVA) PROBATED	EXCESS VACATION (EVA) ACCRUED	EXCESS VACATION (EVA) HOURS DATE	PICK UP PAY HOURS	SAS	SSS	EMP SOC	MERS EMPLOYER CODE	ACTIVITY CODE
0	0	48.0	0	0	0						SVL

REMARKS:
APPROVED FORM MUST BE RETURNED TO EMPLOYEE RECORDS WITHIN 5 DAYS OR NO LATER THAN 3 DAYS PRIOR TO TERM DATE IN ORDER FOR EMPLOYEE TO RECEIVE MONIES DUE.

HUMAN RESOURCES _____ DATE 7/24/91

DISTRIBUTION: 1. White—MASTER FILE; 2. Goldenrod—UTILITY; 3. Pink—UNEMPLOYMENT OFFICE; 4. Blue—DEPARTMENT

COMPANY PRIVATE (WHEN COMPLETED)

RC0001

J. HERNANDEZ Depo. Exh. # 15

Robin E. Hunt, Notary Public
Date 8/20/91

888A CS FEB 87

BEST AVAILABLE COPY

APPENDIX D — LETTER FROM HECTOR SIQUEIROS, PASTOR, DATED APRIL 2, 1993

Latin Free Methodist Church
1702 N. Mohave Avenue, Tucson, Arizona 85745
(602) 623-1694

April 2, 1993

RE: Joel Hernandez

Dear Personnel Management:

With this letter I, Hector Siqueiros, pastor the Latin Free Methodist Church would like to recommend Mr. Joel Hernandez to your facilities.

Mr. Hernandez has assisted our church since August of 1992 and was baptized on October 11, 1992. He has been a faithful and active member of the church along with good rapport with the other members.

I you have any questions regarding Mr. Hernandez, do not hesitate to contact me at your earliest convenience.

Very truly yours,

s/ Hector Siqueiros
Hector Siqueiros
Pastor

APPENDIX E — LETTER FROM JOHN L. LYMAN, M.S., DATED APRIL 26, 1993

April 26, 1993

John L. Lyman, M.S.
4839 W. Spoonbill Dr.
Tucson, Az. 85741
(602) 579-0824

Gentlemen:

I have known Mr. Hernandez for almost a year. I have seen him occasionally at his place of employment and frequently at meetings of Alcoholics Anonymous.

I have worked with recovering alcoholics for ten years and have screened people for the New Hampshire Department of Motor Vehicles and referrals from state and federal parole boards, among my other duties.

I volunteered to write you in behalf of Joel Hernandez as I have seen steady and consistent progress in his recovery from this disease.

Joel attends A.A. regularly, participates in discussion when appropriate, is maintaining his sobriety and is in all a good and active member.

Alcoholics Anonymous has clearly been demonstrated as the best recovery tool for alcoholics and Joel's commitment to the program demonstrates to me his willingness to accept responsibility for his recovery.

Appendix E

In summary, I would heartily recommend Joel Hernandez for any position for which he is qualified. He is a diligent and caring individual who seems to merit a second chance.

You may, if you wish, contact me at home for further information since I am not currently in formal practice due to health reasons.

Sincerely,

s/ John L. Lyman, M.S.
John L. Lyman, M.S.

APPENDIX F — LETTER FROM HUGHES MISSILE SYSTEMS COMPANY, DATED JULY 15, 1994

HUGHES
HUGHES MISSILE SYSTEMS COMPANY

July 15, 1994

Equal Employment Opportunity Commission
Phoenix District Office
4520 N. Central Avenue
Phoenix, Az 85012-1848

Attention: Mary Ann Cantor

Re: Joel Hernandez v. Hughes Aircraft [Hughes Missile Systems Company]
Charge No. 350941479

Dear Ms. Cantor:

Hughes Missile Systems Company, hereinafter referred to as "HMSC," is in receipt of the charge of disability discrimination filed by Joel Hernandez, hereinafter referred to as "Complainant," in which he alleges he was discriminated against on the basis of his disability.[1] Complainant's Charge fails to indicate the nature of his disability and HMSC is unaware of any medical condition which would qualify him

1. Mr. Hernandez erroneously named Hughes Aircraft as his employer. Mr. Hernandez was employed by Hughes Missile Systems Company, a subsidiary of Hughes Aircraft Company (HMSC). This response is prepared on the behalf of HMSC.

as being disabled under the Americans with Disabilities Act. ("ADA"). HMSC categorically denies that it discriminated against Complainant on the basis of a disability or for any other discriminatory motive.

BACKGROUND

Complainant began working at HMSC on July 27, 1966, as a janitor. At the time of his termination Complainant held the position of Calibration Service Technician. Other positions held by Complainant at HMSC include Maintenance Helper, Tester Electronic, Assembler and Tester Functional. Complainant was represented by Bargaining Unit No. 1, of the International Association of Machinists and Aerospace Workers and his employment was governed by a collective bargaining agreement.

On August 7, 1986, Complainant was going to be terminated due to excessive absenteeism. However, Complainant advised his union, management and Labor Relations that he had an alcohol problem which resulted in excessive absenteeism. Therefore, Complainant was offered the option to either enter an alcohol treatment center or be terminated. Complainant chose to enter the thirty day treatment center. In treatment it was determined that Complainant was both alcohol and cannabis dependent and that he was a cocaine user/abuser. Upon his release from the center he returned to work at HMSC.

In 1989, the Company implemented it's Drug Free Workplace Program (Company Practice 3-0-17) which provides for both pre-employment and reasonable suspicion drug and alcohol

testing. Under the terms of the program, the Company may require an employee to submit a blood and/or urine sample for alcohol and drug testing whenever there is a reasonable suspicion that an employee's declining work performance or erratic on the job behavior may be affected by alcohol or drug use (See Attachment A).

On July 11, 1991, Complainant arrived at work demonstrating signs of aberrant behavior including bloodshot eyes, unsteady gait and slurred speech. Consistent with Company Practice 3-0-17, Complainant was required to undergo drug testing. On July 15, 1991, the results of the urinalysis test indicated a positive test for the presence of cocaine. Complainant resigned in lieu of being discharged.

RESPONSES TO ALLEGATIONS CONTAINED IN CHARGE OF DISCRIMINATION

I. On 01-27-94, I applied for one of seven positions as Product Test Specialist and was not hired.

HMSC is in possession of Complainant's application/resume that is both date stamped as received and signed by Complainant on January 27, 1994. Complainant's application indicated that he was interested in a position as Product Test Specialist as well as Electronic, Tester and Calibration Service Technician. HMSC agrees that Complainant has not been offered a position of employment.

II. I have not been [given] a reason for my non-selection.

As a matter of practice, HMSC does not contact unsuccessful applicants to inform them that they have not been selected for a particular position unless the applicant has been interviewed. Complainant's application was received but he was not offered the opportunity to be interviewed for a position.

III. I believe I have been discriminated against in violation of the Americans with Disabilities Act of 1990.

HMSC denies that Complainant was discriminated against in violation of the Americans with Disabilities Act or any other unlawful basis. The ADA prohibits discrimination against a "qualified individual with a disability." The ADA specifically exempts from protection individuals currently engaging in the illegal use of drugs when the covered entity acts on the basis of that use.[2] Contrary to Complainant's unfounded allegation, his non-selection for rehire is not based on any legitimate disability. Rather, Complainant's application was rejected based on his demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation.

---

2. Section 1630.3(b) of the ADA provides that the term "disability" and "qualified individual with a disability" may not exclude an individual who: has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs; or an individual who is participating in a supervised rehabilitation program and is no longer engaging in such use. However, this provision is not applicable in this situation as Complainant has provided no evidence to demonstrate he has cither successfully completed or is currently undergoing drug rehabilitation.

Appendix F

The Company maintains it's right to deny re-employment to employees terminated for violation of Company rules and regulations. Complainant was discharged for violation of Company Rule and Regulation No. 7, "(u)nauthorized or unlawful manufacture, distribution, dispensing, sale, possession, consumption, use or being under the influence of alcohol, a controlled substance or illegal drug during working time, while performing work for the Company or at any time on Company premises; **or testing positive for alcohol or drugs on a *test* requested by the Company.** (Emphasis added.) Complainant elected to resign in lieu of discharge. Complainant has provided no evidence to alter the Company's position that Complainant's conduct while employed by HMSC makes him ineligible for rehire.

CONCLUSION

Based on the foregoing facts, there is clearly no evidence to support Complainant's charge of discrimination. Therefore, it is the position of HMSC, that the charge of discrimination should be dismissed in its entirety. Should you need any additional relevant information, please do not hesitate to contact Gioia Sita at (602) 794-9850.

Sincerely,

Hughes Missile Systems Company

s/ George M. Medina, Sr.
George M. Medina, Sr.
Manager Diversity Development
EEO/AA Programs

APPENDIX G — AFFIDAVIT OF JOANNE BOCKMILLER, DATED JUNE 27, 2000

AFFIDAVIT OF JOANNE BOCKMILLER

STATE OF RHODE ISLAND)
) ss
County of Newport)

Joanne Bockmiller being first duly sworn, under oath, states:

1. I am over the age of 18 and a resident of the State of Rhode Island.

2. I make this affidavit based upon personal knowledge and a review of Hughes Missile Systems Company's nka Raytheon Missile Systems Company ('Raytheon") personnel file for Joel Hernandez.

3. In late January and early February 1994, I worked for Raytheon at its Tucson Arizona facility in the Labor Relations Department.

4. At that time, my name was Joanne Schoch.

5. I officially have changed my name to Joanne Bockmiller.

6. As part of my duties in the Labor Relations Department, and from time to time, I would review applications submitted by former employees to determine if they were eligible for rehire.

Appendix G

7. In late January or early February 1994, the Staffing Department forwarded to me Mr. Hernandez's January 24, 1994 application.

8. Upon receipt of that application, I reviewed the Employee Separation Summary that was contained in Mr. Hernandez's personnel file.

9. Because the Employee Separation Summary states that Mr. Hernandez was "Discharge for personal conduct (Quit in lieu of discharge)," pursuant to Raytheon's practice or policy as I understood it, I made the decision that Mr. Hernandez was not eligible for rehire.

10. At the time Mr. Hernandez's application was denied, Raytheon's practice or policy was that former employees who had been terminated, or quit in lieu of termination, for violating company policies were not eligible for rehire.

11. In late January or early February 1994, I had never met Mr. Hernandez, I did not know him and I did not know anything about his prior employment with Raytheon.

12. At the time I concluded that Mr. Hernandez was ineligible for rehire, I did not know why he quit in lieu of being discharged or what the personal conduct was that was referenced in his Employee Separation Summary.

DATED this 27 day of June, 2000.

s/ Joanne Bockmiller
Joanne Bockmiller

Appendix G

SUBSCRIBED AND SWORN TO BEFORE ME this 27th day of June 2000 by Joanne Bockmiller.

s/ Barbara C. McCarthy
Notary Public
My commission expires: 6/28/01

APPENDIX H — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED AUGUST 20, 1999

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

CIV98-319 TUC JMR

JOEL HERNANDEZ,

Plaintiff;

vs.

HUGHES MISSILE SYSTEMS COMPANY CORPORATION, an Arizona corporation; HUGHES AIRCRAFT, CO., a Delaware corporation, RAYTHEON, CO., a Delaware corporation,

Defendants.

DEPOSITION OF JOEL HERNANDEZ

DATE TAKEN: AUGUST 20, 1999

Appendix H

[Commencing at page 22]

• • •

BY MR. STOLKIN:

• • •

Have you had a chance to review Exhibit No. 4, Mr. Hernandez?

A. Yes, sir.

Q. Do you recognize that document?

A. Yes, sir.

Q. For the record, this is a document to you from Mr. Beagles, again dated October 30, 1985 regarding a final written warning, absenteeism; is that correct?

A. Yes.

Q. With regard to the absences that we've talked about just in Exhibits 3 and 4, do you have any recollection as you sit here today about the absences themselves — did you fail to show up for work at all; did you call in late and say you wouldn't be in there; no call, no show — do you remember?

A. All of the above.

Appendix H

Q. All of the above. After this warning of [23] October 30, 1985, final written warning, did you correct your absenteeism problem?

A. If I recall correctly, meeting with Dick Dupree, I believe I was referred to treatment.

Q. Who's Dick Dupree?

A. He's the psychologist.

Q. For the company?

A. Yes.

* * *

Q. At the time that you were referred to [24] treatment, was that one of two options that you had at the time?

A. I don't recall.

Q. Do you recall that you were on the verge of being terminated or in lieu of termination, instead of being terminated, you could choose to seek help?

A. That is correct.

Appendix H

Q. Hughes at the time told you that because the problem continued you were going to be fired unless you were willing to try to help yourself?

A. Yes.

Q. If I told you that that probably took place in or around August of 1986, would you have any reason to disagree with that?

A. No.

Q. Let me show you what's been marked as Exhibit No. 5.

MR. MARTINEZ: I think this has been previously disclosed, hasn't it?

MR. STOLKIN: Yes, it has.

MR. MARTINEZ: I don't see a Bates number on it. Everything you've always given me is Bates numbered, that's why. . . .

MR. STOLKIN: It may not have come out on the copy, either. I'd give you an answer, but Jane [25] took the day off.

MR. MARTINEZ: I won't assume the worst of you, Counsel. I'll allow you to continue asking questions on this very poor copy.

Appendix H

BY MR. STOLKIN:

Q. Have you seen this document, Mr. Hernandez?

A. No, I haven't seen it.

Q. Do you see your name in the upper left?

A. Yes.

Q. Is the birth date correct?

A. Yes.

Q. Is your payroll number correct?

A. Yes, sir.

Q. Is that the department you worked in?

A. I believe so.

Q. Do you see in the far right the date of August 11, 1986?

A. Yes.

Q. Do you remember ever seeing an M.D., a doctor named Robert Gearhart?

A. No, I don't recall.

Appendix H

Q. In the line marked number one, do you see the diagnosis "alcohol D-E-P", which, I assume, means dependency?

A. Dependence.

[26] Q. Even though you haven't seen that, was that a correct diagnosis at this time?

A. Yes.

* * *

[27] * * *

Q. Let me show you Exhibit No. 6.

MR. MARTINEZ: I don't think we ever got this one either, Ron.

MR. STOLKIN: I have no explanation why there isn't a Bates stamp on it, but, as I said, I [28] will check with my paralegal when she returns.

BY MR. STOLKIN:

Q. Have you had a chance to look at Exhibit No. 6?

A. Yes.

Appendix H

Q. And to your recollection, have you seen that document before?

A. No.

Q. Looking at that document, the top line, it appears to relate to you, correct?

A. Yes.

Q. And on the far right there's a date of September 9, 1986. Do you see that?

A. Yes, sir.

Q. Under diagnosis it shows alcohol dependence continuous, cannabis abuse continuous, cocaine abuse continuous?

A. Yes.

* * *

[35] * * *

BY MR. STOLKIN:

Q. Between September 1986 and, let's say, March of 1991, were you part of any kind of treatment or rehab program?

A. No.

* * *

Appendix H

[36] * * *

Let me show you what's been marked as Exhibit No. 11.

A. Okay.

Q. You've had a chance to look at Exhibit No. 11?

A. Yes.

[37] Q. Have you seen that document before?

A. Yes.

Q. This appears to be a memorandum to you from E.C. L'Armee —

A. L'Armee.

MR. STOLKIN: L apostrophe A-R-M-E-E.

BY MR. STOLKIN:

Q. — a written reprimand for unsatisfactory attendance.

Do you see that?

A. Yes.

Q. Does this refresh your recollection as to whether your attendance was starting to deteriorate?

A. Yes, sir.

Q. Having had your memory refreshed by this, why don't you tell me what you recall now.

A. What I recall was that I was doing it again, what I used to do before. I was abusing drugs and alcohol.

Q. And when did that start up?

A. I don't believe it was like a start-up. I think it was a progressive thing.

Q. If you're able, how long after September of 1986 when you came out of Cottonwood was it before you started using drugs and/or alcohol again?

[38] A. Six months on occasion.

Q. Am I understanding what you just told me, then, from that point it started getting progressively worse?

A. Yes.

Q. Did it affect your attendance?

A. Somewhat.

* * *

Q. Do you know why they wrote Exhibit No. 11?

A. Because of absenteeism.

Q. Something was happening at that time that caused them to call you to talk to them. You got a verbal warning on February 11; do you see that?

A. Yes.

Q. And again you were absent on February 18 and February 23rd and then you got this written reprimand on March 5; do you see all that?

A. That's correct.

[39] Q. As you sit here today, do you recall that even after this reprimand there were problems with your attendance?

A. Yes.

Q. In July of 1991, on or about July 11, 1991, did you come to work under the influence of alcohol or with illegal drugs in your system?

A. Yes.

Q. And that was a violation of company policy?

A. Yes.

Q. Do you have any argument with the fact that the company had a policy prohibiting that kind of conduct?

A. No.

Q. Tell me about the day, July 11, 1991, when you came to work in that condition, what had you been doing before and what happened when you came to work on the 11th?

A. I was up late the night before, 'til 1:00 a.m., and probably for an hour after 1:00 a.m. drank some more beer. When I went to work I was functional in my job and we had a project for an eclipse on that day. We were setting up a demonstration to observe the eclipse, when the manager of the department came by to see it and I [40] conversed with him and he must have smelled my breath.

Q. Why do you think he must have smelled your breath; what happened next?

A. About a half-hour later a supervisor, Bill Dluehosh, came over and told me that I needed to go to the dispensary with him to do a test.

Q. Did he tell you what kind of test?

A. No, he did not need to.

Q. Why not?

A. It was obvious.

Q. Did you know in your own mind what it was about?

A. Yes.

Q. And did you and Mr. Dluehosh go to the dispensary?

A. Yes, sir.

Q. What happened next?

A. They did some testing, like DUI, ability to stand, ability to stand on one foot, bringing one finger up to your eyeball, a series of tests with a finality (sic) of urine.

Q. You gave a urine sample?

A. Yes.

Q. To your recollection, what happened next?

[41] A. They escorted me home and told me to wait for the results of the test.

* * *

Q. Going back a little bit, you said that you had stayed up late the night before or the early morning of the 11th and you had more beer, I guess, right?

A. Yes.

Q. Other than beer, did you consume any other substances?

A. Cocaine.

* * *

[54] * * *

BY MR. STOLKIN:

Q. Did you ask them if they would let you resign so that your record wouldn't show that you were fired?

A. No.

Q. Did they give you that opportunity to resign?

A. Yes.

Q. Let me show you what's been marked as Exhibit No. 15.

A. Okay.

[55] Q. Have you seen that document before?

A. I don't recall.

Q. It's an employee separation summary; is that correct?

A. Yes.

Q. And on the top line it's referring to you, correct?

A. Yes.

Q. You see in a box on the left at the top: "Reason for Separation"?

A. "Specific Reason for Separation"?

Q. No, to the left of that.

A. Yes.

Q. And what box is checked?

A. "Discharge indicates specific reason."

Q. And then to the right of that, I think the box you looked at before, it says "specific reason for discharge." Do you see that?

A. Yes.

Q. And below that it says you were being discharged for personal conduct; do you see that?

A. Yes.

Q. And did you understand the personal conduct to be the drug and alcohol use?

[56] A. Yes.

Q. In parentheses below that, dated July 30, 1991, it says: Quit in lieu of discharge.

Do you see that?

A. Yes.

Q. And that's what you were allowed to do?

A. Yes.

* * *

BY MR. STOLKIN:

Q. Are you currently employed?

A. Yes, sir.

Q. Where are you employed?

A. Marathon Resources, Incorporated.

Q. When did you start at Marathon?

A. May, 1992.

Q. All right. Between July 1991 and May of 1992, what did you do?

[57] MR. MARTINEZ: Employment?

MR. STOLKIN: Yes.

BY THE WITNESS:

A. I had no employment.

BY MR. STOLKIN:

Q. Then what did do you with your time in that period of time?

A. I looked for work and did personal projects for money.

Q. In that period of time did you go back into Cottonwood, for example?

A. No, I did not.

Q. Did you go into any kind of a treatment facility?

A. No.

Q. Did you receive any kind of treatment or care for alcohol and drug use?

A. No.

Q. Did you continue to use alcohol and drugs in that period of time?

A. Yes.

* * *

[62] * * *

BY MR. STOLKIN:

Q. Were you asked why you had left any former employer?

A. No.

Q. You sure?

A. No.

Q. So you're not sure?

A. No.

Q. Let me show you what's been marked as Exhibit No. 26.

A. Okay.

Q. The first two pages of Exhibit No. 26, is that the application that you filled out to go to work at Marathon Resources, Incorporated?

A. Yes.

Q. And that's your signature at the bottom of [63] the second page?

A. Yes.

Q. If you look on the first page, do you see where it says: Previous Employment History?

A. Yes, sir.

Q. Do you see where you reported Hughes Aircraft as your employer?

A. Yes.

Q. Do you see what you wrote as reason for leaving?

MR. MARTINEZ: Foundation.

BY THE WITNESS:

A. No. Okay. Yes.

Appendix H

BY MR. STOLKIN:

Q. Is that your handwriting?

A. Yes.

Q. What did you write?

A. Early retirement.

Q. Was that true?

A. No.

* * *

[74] * * *

Q. What is that document?

A. It's a letter of referral from the pastor of the church that I attend.

Q. And it's dated April 2, 1993, from Mr. Hector Siqueiros of the Latin Free Methodist Church, correct?

MR. MARTINEZ: S-I-Q-U-E-I-R-O-S.

BY THE WITNESS:

A. Yes.

Appendix H

BY MR. STOLKIN:

Q. Have you had a chance to review the entire letter?

A. Yes.

Q. Is there any reference in this letter to [75] rehabilitation from alcohol or substance abuse?

MR. MARTINEZ: Objection; document speaks or itself.

You can answer the question.

BY THE WITNESS:

A. No.

* * *

BY MR. STOLKIN:

* * *

Q. Mr. Hernandez, if I'm not mistaken, you had told me that between the time that you resigned in lieu of termination from Hughes in July of 1991 and the time you became employed at Marathon in May of 1992 you continued to use drugs and alcohol and did not get treatment or rehabilitation, correct?

A. Yes.

Q. After you went to work at Marathon in May of 1992 and the time you applied at Hughes in April of 1993, did you continue to use drugs and alcohol?

A. My answer will be no, except for a period between May of '92, when I hired on, to July the 4th, 1992 was the day I made my determination not to abuse anymore.

Q. What happened on July 4, 1992 that caused [76] you to stop alcohol and drug abuse or use?

MR. MARTINEZ: Calls for a narrative, but you can go ahead and answer.

BY THE WITNESS:

A. I had an experience with drug and alcohol abuse that reflected on my lifestyle and disappointment in my quality of life.

BY MR. STOLKIN:

Q. I have heard the term used for people who have drug and alcohol problems, the term "hitting rock bottom". Have you heard that term before?

A. Yes, sir.

Q. Are you telling me, without, obviously, going into detail, that whatever happened on July 4, 1992 is when you hit rock bottom?

A. Yes.

Q. What happened after this event that we're calling "rock bottom", what did you do?

A. Upon making a determination, approximately two weeks later I went to the church of my childhood, which is the church that's stated right here by Pastor Siqueiros, and together with the spiritual guidance and Alcoholics Anonymous I was successful in not having to go back to what I was.

[77] Q. When did you begin participating in AA, Alcoholics Anonymous?

A. The month of June when my boss saw me sitting down, he suggested it. In order to keep that job, I should go to meetings every day and bring him an attendance slip.

Q. So the incident that you mentioned earlier at Marathon when you were —

A. Caught.

Appendix H

Q. — disciplined or caught sitting down was related somehow to the use of alcohol and your supervisor recognized that; is that what you're telling me?

A. Yes.

* * * *

APPENDIX I — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED AUGUST 30, 2000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 98-319 TUC JMR

JOEL HERNANDEZ,

Plaintiff,

vs.

HUGHES MISSILE SYSTEMS COMPANY CORPORATION, an Arizona Corporation; HUGHES AIRCRAFT CO., a Delaware Corporation; and RAYTHEON CO., a Delaware Corporation,

Defendants.

TELEPHONIC DEPOSITION OF JOANNE BOCKMILLER

August 30, 2000

Tucson, Arizona

Appendix I

[Commencing at page 5]

* * *

BY MR. MARTINEZ:

Q Ms. Bockmiller, do you have any documents in front of you at this time?

A Do I have any documents?

Q Yes. Any documents related to this case in front of you.

A I have a copy of the Employee Separation Summary.

Q Can you describe that document for me?

A It's a document that was completed with information with regard to Joel Hernandez' separation and it has the date of his termination and the reason for termination.

Q And what is the date indicated on that [6] document as to the date of termination?

A It has an effective date of 7/12/91 and also written in below that is a notation that "Quit in lieu of discharge" and it was signed by an individual on 7/30.

Appendix I

Q And who is the individual's signature that appears on that document?

A It has initials. It was Theresa Garcia.

Q Are there just initials there or is there actually a signature?

A There's initials T something G, but I recognize the signature on the bottom as Theresa Garcia and that's her initials.

Q That's someone you had worked with?

A Yes.

Q Is that a one-page document, ma'am, or more than one?

A One page.

Q Is that a document that you had seen before today?

A Yes.

Q When did you first see that document?

A At the point in time where I had reviewed Mr. Hernandez' application for re-hire. It was shortly after that that I had requested his personnel file, and [7] a copy of that was in his personnel file.

Q Did you see his entire personnel file?

A Yes.

Q Did you review his entire personnel file?

A I don't recall specifically if I would have reviewed every document, but I did have access to the file.

* * *

[13] * * *

Q Have you reviewed any other documents in relation to Mr. Joel Hernandez and any litigation he may have against Hughes Missile Systems?

A I have reviewed portions of the position paper that was provided to the EEOC.

Q That position statement which is in response to the charge of discrimination?

A Yes.

Q Do you still have that document?

A No, I do not.

Q And when did you last see that document or portions of that document?

A About a year ago.

Q Did you prepare any portion of that document?

A No, I did not.

Q Do you know who prepared it?

A No, I do not. I can't say for sure.

* * *

[19] * * *

Q Did you have any responsibilities at all in the area of equal employment opportunity during that seven-year period?

A No, I did not.

Q How did your job change when you became a labor relations representative?

A At that time instead of processing the administrative portion of labor relations responsibility I was responsible for working with the union stewards and union representatives, as well as management in resolving various issues, such as grievances, employee relations issues, that type of thing.

Q Were you involved in the hiring of employees at that time?

A We were involved in a portion of the hiring process.

Q What portion?

A As applications were to come in to the Staffing Department, they would do an initial screen of the applications to determine whether or not they met the requirements for the job openings that we had. Those applications then would be sent to Labor Relations [20] and we would review the applications to determine, first of all, whether or not the employee worked at the company previously and then, secondly, to review the requirements to make sure that they met the minimum requirements of the job as it was posted.

Q Did you have those responsibilities at the time that you reviewed Mr. Hernandez' application for reemployment?

A Yes.

Q And did you review his, if he met the requirements for the position or positions he was applying for?

A The initial review that I conducted was to determine whether or not he had worked at the company previously and requested his personnel file to review his prior work history. And so a determination at that time was not officially made with regard to whether or not he met the minimum requirements or not.

Q So essentially, if a person had worked previously with the company, that's the threshold inquiry that you were making?

A Correct.

Q And you never got past that threshold inquiry?

[21] A Correct.

Q Now, Mr. Hernandez in his application had indicated that he had previously worked for the company, correct?

A That's what I recall, correct.

Q And did you have available the information that he submitted as a part of his application?

MR. STOLKIN: Objection to form.

A Could you repeat that?

BY MR. MARTINEZ:

Q Yes, ma'am. When you were made aware of Mr. Hernandez' application for reemployment with Hughes were you provided a copy of any documents that he had submitted at that time?

A I don't recall. What I remember is his application. I don't recall anything else submitted with it.

Q Do you recall if any letters were submitted as a part of his application?

A I don't recall that.

Q Do you recall if he had provided any information with respect to his sobriety?

A I don't recall that.

Q Do you recall if he had provided any information with respect to his rehabilitation as to any [22] previous use of alcohol or controlled substances? Substances. Sorry, my tongue is not working quite well this morning.

A I don't recall that either.

Q If that kind of information — and this is, of course, only if you know. At the time that this review occurred was it the practice at Hughes here in Tucson to give you everything the applicant had submitted or to give you a copy of everything they had submitted?

A My understanding is that is the practice.

Q Would it be your expectation, ma'am, that if, in fact, Mr. Hernandez had submitted various documents that you would have had all of those available to you at the time of your review?

A I believe so.

Q I'm sorry. What did you say?

A I believe that's correct.

Q And prior to reviewing Mr. Hernandez' personnel file do you recall if you were already aware of his having made reference or having identified any issues with respect to sobriety or rehabilitation which would indicate to you either prior substance abuse related to alcohol or some controlled substance?

A I was not aware of that and the personnel [23] file would not indicate that information.

Q I was just asking if, based on the documents or document that you saw before you saw the personnel file, if you had received anything that indicated that to you.

A Not that I recall.

Q Where at that time would Mr. Hernandez' personnel file have been kept? Where were you retrieving it from?

A I requested the personnel file through the Staffing Department, so I'm not sure specifically where they would have gotten it from.

Q Was it provided to you?

A That's correct.

Appendix I

Q And you reviewed that file in its entirety?

A I reviewed information in the file.

Q Do you recall what you reviewed in that file?

A I remember reviewing the Employee Separation Summary.

Q Anything else?

A Not specifically, no.

* * *

[25] * * *

Q At the time that you first saw this document — and I'm assuming that the first time you saw this document is in connection with reviewing Mr. Hernandez' application for reemployment. Is that correct?

A That's correct.

Q Did you determine the specific reason as to why Mr. Hernandez was terminated or quit in lieu of discharge?

A No, I did not.

Appendix I

Q Have you learned since then the reason why he quit in lieu of discharge?

A Yes.

Q When did you learn that?

A During the process, probably about a year ago, working with George Medina as he was responding to the lawsuit.

* * *

[33] Q And assuming for the moment that at the time of reemployment Mr. Hernandez was rehabilitated — so I'm just asking you to assume that for the purpose of this question; okay — what procedure, did you have in place at the time to allow for his application to be considered for reemployment?

MR. STOLKIN: Objection, form and foundation.

A Because the individual was a quit-in-lieu-of discharge, based on the practice that we had, the individual would not be eligible for re-hire.

Q And when you say "the practice," you're talking about a verbal practice, right? You're not talking about anything in writing?

A That's correct.

Q You had no written direction telling you to do that?

A That's the practice that we had in place and, correct, it was not in writing.

Q And nobody had ordered you in writing to do that, correct?

A Correct.

Q So am I correct then in understanding that at the time that you reviewed Mr. Hernandez' application for reemployment that because of the circumstances of [34] his termination there was nothing in place to take account of the prior termination or discharge — I'm sorry — resignation in lieu of discharge having been the result of something for which he was not rehabilitated? The question is a little convoluted. Let me start over. At the time that you reviewed Mr. Hernandez' application for reemployment there was nothing in place to take account his specific circumstances, correct?

MR. STOLKIN: Objection, form.

A As far as the background information?

BY MR. MARTINEZ:

Q Yes, ma'am. Specifically, as I've said, you know, he had prior drug use that led to a resignation in lieu of discharge, he's now seeking reemployment, and has submitted documentation indicating to the company that he

was rehabilitated from drug use. And my question is that at the time you reviewed his application for reemployment, you had nothing in place to take account of those specific circumstances, correct?

A He was basically treated the same as we would anybody else who had been terminated or quit in lieu of discharge and was not eligible for re-hire.

* * *

[43] * * *

. . . Did you understand at the time that Mr. Hernandez sought reemployment with Hughes that [44] his history of drug and alcohol use should not be a basis or the only basis to disqualify him for employment or reemployment with the company?

MR. STOLKIN: Same objection as last.

A At the time that I reviewed his application I was not aware of his history.

BY MR. MARTINEZ:

Q That wasn't my question, ma'am. My question is: Did you understand at that time that drug or alcohol history was not a consideration that should be made? Or a factor that should be considered.

MR. STOLKIN: Form and foundation.

A Specifically with him?

BY MR. MARTINEZ:

Q With anyone with that history.

A If it was a new applicant, it would not be an issue.

Q So it's only an issue if you're an old applicant or a former employee?

MR. STOLKIN: Objection, form.

A A former employee that had been terminated from the company.

BY MR. MARTINEZ:

Q And in this case, for drug or alcohol use?

A In this case I wasn't aware of it at the [45] time.

* * *

As a labor relations representative did you have access to medical records of an employee or former employee?

A No, we did not.

Q Did you request any medical records pertaining to Mr. Hernandez?

A No, I did not.

* * *

[46] * * *

Q When you made the determination in this case did you do that in writing?

A I recall putting a note on a small yellow Post-it note.

Q Have you seen that note?

A Not recently.

Q Have you seen a copy of it?

A Probably a year ago.

Q And what did you see it on? Was it by itself or on part of another document?

[47] A I don't recall specifically.

Q Do you recall on what document you placed the Post-it note?

A Not specifically.

Q Do you recall what you wrote on the note?

A It was words to the effect that the individual should not be considered for re-hire.

Q And to whom were you addressing that note?

A It would have been to the staffing recruiter.

Q And who was that?

A That's the individual that was only there for a short time.

Q And the reason you were saying he should not be considered for re-hire was because of the previous resignation in lieu of discharge?

A That's correct.

Q Did you discuss that determination with anyone prior to making it?

A Not that I can recall.

Q Did you consult with George Medina prior to making that determination?

A No, I did not.

* * *

[48] * * *

Q Did you have any other involvement with respect to Joel Hernandez and his employment with Hughes? Or I should say his application for reemployment with Hughes.

A Not that I'm aware of.

Q Did you ever meet him?

A No, I did not.

Q Did you ever ask him any questions about his application for reemployment?

A Not that I recall.

Q So there was no communication between the two of you, is that correct?

A Right.

* * *

[49] * * *

Q At the time that Mr. Hernandez sought reemployment with Hughes did you know if he was a person who was still drinking to the point of abusing alcohol in a manner we might describe as an alcoholic?

A I had no knowledge of that.

Q Did you have any information that indicated to you at the time that you reviewed Mr. Hernandez' application for reemployment that he was abusing any substances?

A I had no knowledge of that.

* * *

[53] * * *

Q Did you have any role in responding to Mr. Hernandez' charge of discrimination?

A No, I did not.

* * *

[54] A Not that I recall.

Q Did you provide him any documents?

A Not that I recall.

Q What else did he tell you?

A That's all that I really remember at this point, is that there was an issue. And we may have had discussions with regard to certain pieces of information in the case.

Q What information?

A For instance, reviewing the application and separation summary.

Q What else?

A That's all I can recall at this point.

Q Have you spoken with Mr. Medina since then?

A I had gotten a call a few months ago and he had indicated that I may be contacted as a result of his deposition.

Q What did he tell you at that time?

A That was basically it; that he had provided a deposition and my name had come up during the process and I may be contacted.

* * * *

APPENDIX J — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED APRIL 12, 2000

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

No. CIV-98-319-TUC-JMR

JOEL HERNANDEZ,

Plaintiff,

vs.

HUGHES MISSILE SYSTEMS COMPANY CORPORATION, et al.,

Defendants.

DEPOSITION OF GEORGE MEDINA

April 12, 2000

Tucson, Arizona

Appendix J

[Commencing at page 17]

* * *

BY MR. MARTINEZ:

* * *

Q. Did you investigate Mr. Hernandez's charge of discrimination?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: No, I didn't, Richard.

BY MR. MARTINEZ:

Q. You did prepare a position statement?

A. No, I did not prepare it myself.

Q. It was prepared for you?

A. Well, it wasn't prepared for me specifically.

Q. You did sign a position statement?

A. No, I didn't. I didn't sign a position statement at all.

Q. Was it signed on your behalf?

A. That's correct. It was signed by a lady [18] named Gioia Sita. S-I-T-A is her last name.

Q. J-O-Y-A?

A. I believe it is G-I-O-I-A. It is on the position paper.

Q. And what position did Ms. Sita have with the company?

A. She was a contract worker working in my department.

Q. What does that mean, contract worker?

A. She wasn't a regular employee in the sense that I was a regular full-time employee. She was a temporary employee, if you will.

Q. And what were her responsibilities with respect to preparing the position statement specific to Mr. Hernandez's case?

A. Specifically to Mr. Hernandez's case she was responsible for investigating the charge of employment discrimination and responding to the EEOC with a position paper.

Q. Did you review that position statement prior to it being submitted?

A. I believe I did.

Q. Did you review any investigation?

A. That I do not recall specifically sitting down and reviewing documents. More likely I would have [19] talked to her regarding her investigation.

Q. At the time that Ms. Sita was charged with investigating the matter, do you believe she was competent to conduct such an investigation on behalf of Hughes?

A. I think so.

Q. Do you believe she was competent to undertake an investigation concerning the Americans with Disabilities Act?

A. I think so.

Q. And did you believe that she was in a position to recognize if, in fact, there had been rejection of Mr. Hernandez's application based solely on his employment history with the company?

MR. STOLKIN: Objection; foundation.

THE WITNESS: Yes, I think she would have been competent to recognize that.

Appendix J

BY MR. MARTINEZ:

Q. And that's, in fact, what happened in this case, correct?

A. Which part?

Q. Mr. Hernandez's application for employment with Hughes in 1994 was rejected based exclusively on his employment, prior employment history with Hughes?

[20] A. That's correct.

Q. And the specific part of that employment history that caused his application in 1994, January of 1994, to be rejected was the fact that he had previously had issues concerning alcohol and/or drug abuse?

A. I don't agree with that statement you made.

Q. Okay. What do you disagree with or what part of that statement do you disagree with?

A. It was my understanding his application for employment was rejected because he had been essentially terminated from Hughes Aircraft Company for a violation of company policy.

In this particular case, yes, it did deal — the violation did deal with the use of drugs and alcohol but his application would have been rejected had he been fired for stealing or fighting or anything like that.

Appendix J

Q. Are you saying that at the time of Mr. Hernandez's termination from employment that he was from that point on considered ineligible for reemployment?

A. Yes.

* * *

[46] * * *

Q. [D]o you agree, sir, that Mr. Hernandez's application for employment in January of 1994 was rejected specifically because of his record of past alcohol and drug use?

A. No, I don't agree with that, Richard.

Q. And do you agree that that's the underlying reason?

A. No, sir, I don't.

Q. Well, do you believe that there is any policy of Hughes Aircraft Company that Mr. Hernandez violated, other than his past use of alcohol or drug use?

A. I'm not aware of any.

Q. And the rejection of the application then was because of the belief that that past alcohol and drug used violated company policy?

A. Yeah. He had violated company policy because of the alcohol and drug use.

Appendix J

Q. And that's the reason?

A. That's the violation.

Q. And that's the reason for the rejection [47] of the application?

A. The rejection of the application was because he had been, like I said, fired, essentially.

At the time and currently our practice has always been if you're fired that we don't rehire you back. I guess that's redundant, rehire you back, but we don't rehire you.

Q. Not eligible for rehire?

A. I guess that's another way of putting it.

Q. And just so I'm clear, when you say "fired," you're using that term to include resignation in lieu of discharge, correct?

A. That's correct, in lieu of discharge.

Q. And you're then treating that as a part of the practice that you have identified earlier this morning, which is not to hire or not to treat a person as eligible for rehire?

A. Yes, sir.

Appendix J

Q. And in this case we agree the company policy violated by Mr. Hernandez is exclusively on his past alcohol and drug use, correct?

A. Right.

* * *

[50] * * *

. . . [P]art of the rationale that was offered to the EEOC of this case, that Mr. Hernandez years before had had his two bites of the apple, correct?

A. Yeah. That, I believe, was mentioned in the responses to the EEOC, yes.

Q. And irrespective of his rehabilitation that he would not be given the opportunity to have, quote, "another bite of the apple," right?

A. I'm not sure how that language was put in our responses to the EEOC, but essentially we argued that, hey, he violated company policy and we just don't bring back people who have been discharged, and we just don't bring them back.

Now, that may have made some reference to his history, for history sake, in terms of responding to the EEOC.

* * *

Appendix J

[74] * * *

Q. Who was the person that made a decision that Mr. Hernandez was not eligible for reemployment?

A. From what I understand, it would have been Joanne Bockmiller, formerly Schochi, S-C-H-O-C-H-I, I guess. I'm not really sure of the spelling.

Q. Is she still with the company?

A. Yes.

Q. In what position?

A. I believe she is a manager back east some place, I think, in Rhode Island.

Q. What position was she in in 1994?

A. I believe she was a labor rep at the time.

Q. Do you know what department she works in today?

A. Human resources, but I don't know what missile unit. I don't know what business unit.

Q. Was she the recruiter?

A. No. She was a labor rep working in the labor relations.

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Q. And what was — how would the decision — let me ask it this way.

In 1994 was a labor rep vested with the. . . .

[75] * * *

Q. So she [Bockmiller] had a role in screening?

A. Right.

Q. In this case I think we agree that the screening included reviewing Mr. Hernandez's personnel jacket because he had indicated he had been a prior employee of the company?

A. That's my understanding, yes.

Q. And that would have then brought out the information about his prior resignation in lieu of discharge?

A. That's correct.

Q. And the two instances testing positive for drug use?

A. That I'm not sure of. I don't think so but I'm not sure.

Q. And why do you say, "I don't think so?"

A. Because that might be information that's not in the personnel jacket, which is a red color.

Q. It might be considered confidential information that is kept somewhere else?

[76] A. Possibly.

Q. Would the personnel jacket at least include the reason for resignation in lieu of termination?

A. It may of had some reference to violation of company policy. I don't remember. I'd have to take a look at the separation document.

Q. Would the separation document be in a personnel jacket?

A. Correct.

* * *

[77] Q. What did she tell you?

A. To the best of my recollection, what she told me was that she probably did, in fact, tell staffing that this person should not be rehired based on the fact that he had been discharged or quit in lieu of discharge.

Q. Okay. Did she tell you she knew the basis for the resignation in lieu of discharge?

A. No, she didn't know the basis of it.

Q. She didn't know that it was drug or alcohol related?

A. To my understanding, that's right, she did not know that.

Q. Why would she not have known that?

A. I don't know.

MR. STOLKIN: Objection; foundation.

THE WITNESS: I don't know.

BY MR. MARTINEZ:

Q. Did you discuss that with her?

A. I don't remember discussing that specifically with her. I can speculate, if you'd like.

MR. STOLKIN: I'll instruct you not to speculate.

THE WITNESS: Okay. Well, then I don't [78] know.

BY MR. MARTINEZ:

Q. Would she have read the personnel jacket?

A. That I don't know, Richard.

Q. Would she have access to it?

A. Yes.

Q. Because she is authorized to review Mr. Hernandez's personnel jacket?

A. Correct.

Q. What was your understanding of the labor representative's responsibilities in the screening process at that time?

A. Just essentially that staffing might give them a call saying that we got this person who is applying for the position who says that they were hired here or they had worked and that they had worked here previously, any reason we shouldn't consider the application any further.

And, again, they would take a look at the personnel jacket to determine whether or not we would rehire them, give them further consideration. And if they had been fired before, we're not going to rehire them, which is what happened in the Hernandez case.

And, like I said before, had he been fired for stealing or some other company violation, [79] Joanne probably would have arrived at the same determination, do not consider for rehire.

Q. Is there any circumstances where an employee who suffers from a disability that somehow leads to their termination from employment is reviewed as to the role of that disability in considering an application for reemployment?

A. Well, I guess I would hope that a person with a disability wouldn't lead to some kind of termination, that we would catch that before that. In fact, if they came forward and said they needed some kind of special accommodation, we would review that. Maybe I misunderstood your question.

Q. Let's take the specific example of Mr. Hernandez. I think we previously agreed that his circumstances he had a history of active drug use, correct?

A. It is my understanding, right.

Q. I think we agreed that was a disability from which he suffered, correct?

MR. STOLKIN: Objection; foundation.

THE WITNESS: I don't know how to answer that, Richard. He had a history of it, I'll admit. I don't know if he ever recovered or he is still a user. I don't know.

* * *

Appendix J

[81] * * *

Q. . . . .

MR. STOLKIN: Objection; form.

. . . .There is an opportunity to self identify if you have a disability. So if he wanted to identify himself as a person with a disability, he would have had that opportunity.

BY MR. MARTINEZ:

Q. Let's explore that for a minute.

Had Mr. Hernandez identified himself as a person with a disability, had he indicated he had a history of drug and/or alcohol abuse?

A. I don't know if he did or not.

Q. Had he, would he have been allowed to go forward in the hiring process?

A. I think our position would have been, hey, look, he had violated company practice, policies, rules, whatever, and our practice has always been that they don't get reemployed.

Q. And the practice has no exceptions?

A. To my knowledge, no.

* * *

Appendix J

[109] * * *

Q. Come back, reapply, am successful this time, successful with my drug and alcohol screening, that even though I tested positive 12 months before, I may or may not have to comply with number six, which is to have a medical or employee counseling screening to determine that I am successfully recovered?

A. I agree with that statement.

Q. Because it is not clear that one would even have to do that even though 12 months before I had been unsuccessful, correct?

A. Right.

Q. Now, on that portion of policy 3-0-17 that references employees, it states that if they test positive after they have been employed that there will be a determination made as to whether the employee should be discharged or offered the option of formal employee counseling, correct?

A. Correct.

Q. It also states that if one refuses counseling that the employee will be terminated, correct?

A. That's correct.

Q. And even if an employee is recommended for counseling, they still, in addition to the [110] counseling, may be subject to discipline for any incident that results in their having medical testing, meaning drug or alcohol screening, correct, number 10?

A. That's right.

Q. And also failure to comply with the testing procedures can or will result in termination, correct?

A. Yes.

Q. This portion of the practice that I've just read from, items 7 through 10, does not state anywhere that if an employee, in fact, is terminated, they are not eligible for rehire, correct?

A. That's correct.

Q. Is there anywhere in this possible, Mr. Medina, a provision or text that provides that an employee who is terminated for drug or alcohol abuse is not eligible for rehire?

MR. STOLKIN: Objection; form.

THE WITNESS: I do not believe so. I didn't see anything like that.

BY MR. MARTINEZ:

Q. Can you tell me, sir, why Hughes has a written practice that provides for an applicant who has tested positive for drugs or alcohol or both to be eligible for hiring 12 months later and has an informal [111] or verbal practice that if you were terminated for such, you're not eligible for reemployment at any time?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: Richard, I can't tell you why because I wasn't involved in drafting these policies or the practice that we discussed.

BY MR. MARTINEZ:

BY MR. MARTINEZ:

Q. Has anybody ever offered you a rationale for that?

A. No, sir.

Q. Have you ever questioned why that difference in treatment of employees versus applicants?

A. No, I've never questioned it.

Q. You'd agree with that, that they treat applicants different than former employees?

MR. STOLKIN: Objection; foundation.

BY MR. MARTINEZ:

Q. The distinction between this written practice 3-0-17 and the —

MR. STOLKIN: Form and foundation.

THE WITNESS: I don't know about the contradiction.

BY MR. MARTINEZ:

Q. I didn't say "contradiction."

[112] A. In my opinion, I think we're talking about apples and oranges.

Q. Does it treat them different?

MR. STOLKIN: Same objection.

THE WITNESS: I don't think it is really clear. Certainly the language is not similar, and I guess I got to say that after rereading it a little bit that while the language is a little different, I think it gives the employees the same type of break as it gives applicants in the sense that we do give our employees an opportunity to get counseling.

I mean, that's what the language says. The applicant gets a break here as well with respect to employment, so I don't believe one gets a better break than the other.

BY MR. MARTINEZ:

Q. That wasn't my question.

A. I understand.

Q. My question was, are they treated different, former employees seeking reemployment versus an applicant who has never worked for Hughes before?

MR. STOLKIN: Objection; form, asked and answered.

THE WITNESS: Again, I guess I'll just go back to my previous answer. It is obvious there is a [113] language difference in the policy itself, so, technically, yes, they are treated a little differently.

BY MR. MARTINEZ:

Q. Is there any discretion on the part of human resources with respect to an applicant's eligibility for reemployment after the passage of 12 months between a positive drug test or alcohol test and that subsequent application and a negative drug test or alcohol screen?

A. I don't know. I'd have to read this practice a little bit.

Q. Well, let me ask you this, do you see under applicant's —

A. Yes.

Q. — it would appear to me that there is no discretion if I tested positive, as any applicant tested positive, they have a waiting period of 12 months before they can apply again and be considered eligible for hire?

A. I agree.

Q. It is not discretionary?

A. That's right.

Q. At the same time, once the 12 months have passed I am automatically eligible, correct, for [114] consideration?

A. That's right.

Q. And I take it that there is not one of these informal practices or verbal practices to eliminate those individuals, correct?

A. Not as far as I know. I don't have any knowledge of that.

Q. So it is not like being a former employee I will be considered, right?

A. Uh-huh, that's right.

Q. I mean, I will go forward. I have my application and there is a testing phase. If I'm successful there, I go on to the interview phase. If I'm successful there, I get my job offer and I still have to pass the medical phase, correct?

A. Correct.

Q. And if I've put in a letter, like the one Mr. Hernandez did from Mr. Lyman, then I am subject to a medical or employee counseling screening to determine if I am successfully recovered, correct?

A. Yes.

Q. So all of those things happen automatically, correct?

A. Yes, sir.

Q. But if I'm an employee like Mr. Hernandez [115] and have checked off or identified that I am a former employee, then those automatic steps will not happen, correct?

A. Yes, but only if there is a legitimate rationale or reasons as to why he should not be reemployed.

Q. Well, do you have a reason why — strike that.

Do you know why former employees who test positive for drugs or alcohol are not treated the same as applicants?

A. No.

Q. Would you agree with me, sir, as to any applicants seeking employment with Hughes, including former employees, that the procedure identified in paragraph number six of policy 3-0-17 would not only provide Hughes adequate opportunity, but all information needed to determine if, in fact, that person was drug and alcohol free and was successfully recovered?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: Yeah, I would agree with you.

(Exhibit 6 marked for identification.)

[116] BY MR. MARTINEZ:

Q. Let me show you what has been marked as Exhibit 6.

Once you've had an opportunity to read it my first question is, is this a document with which you're familiar?

A. It looks familiar to me.

Q. It is stamped "company private." Do you see that?

A. Yes, sir.

Q. Does that indicate to you that this was a document that Hughes had or Hughes Missile Systems had?

A. Yes.

Q. And what is the significance of being stamped "company private"?

A. It just means that the information contained is sensitive and it is just to handle it very, very carefully.

Q. Do you know where information of this type is kept?

A. I believe this either would have been in the medical folder or the employee counseling folder.

Q. Is this the kind of documentation that the company would keep on an employee who had been referred to counseling as a result of drug or alcohol [117] abuse?

MR. STOLKIN: Objection; foundation.

THE WITNESS: If the employee gave, I guess, the doctor permission for that information to come to us, yes.

BY MR. MARTINEZ:

Q. While for it to be in the company file, I take it even if it is the medical file or the counseling file, I'm assuming it is there by consent of Mr. Hernandez?

MR. STOLKIN: Foundation.

THE WITNESS: That would be my assumption as well.

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BY MR. MARTINEZ:

Q. You don't believe that the company is putting information in the file about Mr. Hernandez that they don't have permission to have; is that correct?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: That's correct.

BY MR. MARTINEZ:

Q. This indicates the medical summary diagnosis of Mr. Hernandez, correct?

A. Yes, sir.

[118] Q. And at a minimum the medical department with respect to Mr. Hernandez would know that he had a history of alcohol dependency, correct?

A. Yes.

Q. Cannabis dependency, continuous, correct?

A. That's correct.

Q. And cocaine abuse continuous; is that correct?

A. That's correct.

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Q. And as an applicant for employment with Hughes at the stage where the person is reviewed by the medical department, this would be information available to them, the file on the employee?

MR. STOLKIN: Objection; foundation.

THE WITNESS: I would assume so.

BY MR. MARTINEZ:

Q. In fact, isn't that where you keep the information on drug screens, in the medical file?

A. I believe so.

(Exhibit 7 marked for identification.)

BY MR. MARTINEZ:

Q. Let me show you Exhibit 7. So, for example, the drug screen result which is reflected in Exhibit 7 reflects a positive test for cocaine metabolites would also be available in that medical [119] file on Mr. Hernandez, correct?

MR. STOLKIN: Objection; foundation.

THE WITNESS: I can't answer that with specificity; however, it does on the top of the paper say, "Hughes Aircraft Company," so I'm assuming that would be in the medical file.

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BY MR. MARTINEZ:

Q. And it also says, "medical department," doesn't it?

A. Oh, it does, that's correct.

Q. Isn't it true, Mr. Medina, that even if Mr. Hernandez doesn't identify himself as a person who has a history of drug abuse or alcohol abuse, that if he gets to the phase in the employment process where he is having the medical evaluation, because of the information in the company's medical file concerning Mr. Hernandez you're going to know about that history?

MR. STOLKIN: Objection; form and foundation.

THE WITNESS: Theoretically we would know. In the practical sense it seems to me he would have had to have said something that may have given rise to the fact he may have had a previous history. The medical department may or may not recognize him or know him.

* * * *

APPENDIX K — DETERMINATION OF THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, PHOENIX DISTRICT OFFICE DATED NOVEMBER 20, 1997

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Phoenix District Office

3300 N. Central Ave., Suite 690
Phoenix, AZ 85012
PH: (602) 640-5000
TDD: (602) 640-5072
FAX: (602) 640-5071

Charge No. 350-94-1479

Joel Hernandez
1001 W. St. Mary's Road, #510
Tucson, AZ 85745

Charging Party

Hughes Aircraft (Hughes Missile Systems Company)
Old Nogales Highway
Tucson, AZ 85706

Respondent

DETERMINATION

I issue the following determination on the merits of this charge.

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Respondent is an employer within the meaning of Title I of the Americans with Disabilities Act of 1990 (ADA), as amended, 42 U.S.C. §12101, et seq. and timeliness, and all other requirements for coverage have been met.

The Charging Party alleged that on January 27, 1994, he applied for one of seven positions as Product Test Specialist and was not hired because of a disability.

Examination of the evidence reveals Charging Party was previously employed by Respondent for approximately 20 years. He held various positions in which he successfully performed the job functions required of a Product Test Specialist. On July 15, 1991, he resigned in lieu of discharge as a result of testing positive for alcohol and illegal drugs. In January 1994, Respondent had seven openings for Product Test Specialist. On January 27, 1994, Charging Party submitted his resume to Respondent for consideration for one of these positions. The evidence indicates that at the time of his application Charging Party submitted a statement to Respondent indicating he was recovered and no longer an illegal drug or alcohol user. The evidence shows Respondent rejected Charging Party's application based on his record of past alcohol and drug use.

The Americans with Disabilities Act states that an employer may not deny employment to a drug addict or alcoholic who is not currently using drugs or alcohol and has been rehabilitated, because of a history of drug addiction or alcoholism. In this instance, Respondent denied employment to charging Party because of his history of drug and alcohol

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abuse. Accordingly, I find reasonable cause to believe that Charging Party was denied hire to the position of Product Test Specialist because of his disability.

Upon finding that there is reason to believe that violations have occurred, the commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the commission now invites the parties to join with it in reaching a just resolution of this matter. The confidentiality provisions of ADA and Commission Regulations apply to information obtained during conciliation.

If the Respondent declines to discuss settlement or when, for any other reason, a settlement acceptable to the office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A Commission representative will contact each party in the near future to begin conciliation.

On Behalf of the Commission:

NOV 20 1997
Date

s/ Charles D. Burtner
Charles D. Burtner
District Director